In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1182

RAYMOND MATTZ, PETITIONER

v.

G. RAYMOND ARNETT, AS DIRECTOR OF THE DEPARTMENT OF FISH AND GAME OF THE STATE OF CALIFORNIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST DISTRICT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted in response to the Court's order of October 10, 1972, inviting the Solicitor General to express the views of the United States in this case.

1. This action was brought by the respondent for forfeiture of five nylon gill nets owned by the petitioner, Raymond Mattz, on the ground that he used the nets in violation of California's fish and game laws. The nets were seized by a state game warden on land owned by a lumber company within Del Norte County, California, on the Smith River within one mile of its confluence with the Klamath River, and

less than 20 miles from the mouth of the Klamath (Pet. App. A, p. 1).

The petitioner intervened to resist the forfeiture, alleging that he is an enrolled Indian of the Yurok Tribe, that the nets were seized within Indian country as defined by 18 U.S.C. 1151, and that the California law prohibiting use of the nets was therefore inapplicable (*ibid.*).

The trial court held that the land where the nets were seized was not "Indian country" within the scope of 18 U.S.C. 1151 (Pet. App. B, p. 2) and the Court of Appeal of the State of California, First Appellate District, affirmed (Pet. App. A). The Supreme Court of California denied petitioner's application for review (Pet. App. C).[1]

The decision below, in our view, is incorrect in holding, in effect, that Congress by permitting homesteading of lands within an Indian reservation thereby terminated the reservation (Pet. App. A, pp. 5–6). This is contrary to this Court's holding in *Seymour* v. *Superintendent,* 368 U.S. 351, and is also contrary

[1] Having ruled that the land where the nets were seized was not Indian country, the California courts did not reach the issue whether, if the land is Indian country, petitioner is a beneficiary of rights which make the California regulation inapplicable to him. California is one of the States granted criminal and civil jurisdiction within Indian country by Public Law 280, 67 Stat. 588, codified as 18 U.S.C. 1162 *et seq.*, 28 U.S.C. 1360 *et seq.*, and 25 U.S.C. 1321, *et seq.* That statute, however, expressly provides that the grant of jurisdiction shall not "deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to * * * fishing or the control, licensing, or regulation thereof." 18 U.S.C. 1162(b). See also Pet. App. A, pp. 1–2.

to Congress' express definition of Indian country in 18 U.S.C. 1151 (62 Stat. 757, as amended by 63 Stat. 94) as "all lands within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent * * *."

2. The rather complex history of the Klamath River (or Hoopa Extension) Reservation is outlined in the petition (pages 3–5) and, except for the meaning of the Act of June 17, 1892, 27 Stat. 52, is not in dispute. This Court affirmed the existence and boundaries of the Reservation in *Donnelly* v. *United States*, 228 U.S. 243, 253–259. Essentially, the Klamath River Reservation was established by Executive Order of President Pierce dated November 16, 1855. It extended along the Klamath River for a width of one mile on each side for a distance of 20 miles inland from the Pacific Ocean and included the land in question here. By Executive Order dated October 16, 1891, President Harrison extended the Hoopa Valley Reservation to take in the original Klamath River Reservation.[2]

Between the passage of the General Allotment Act

[2] We are lodging with the Clerk and have furnished to the parties copies of an illustrative map of the Hoopa Valley Reservation with the 1891 extension and the map of Indian Land Areas dated 1971 published by the U.S. Department of the Interior showing the continued existence of the Reservation. There is pending in the United States Court of Claims a suit, *Jessie Short, et al.* v. *United States*, No. 10263, in which the issue is whether the joining of the two reservations gave all Indians residing therein rights in the whole or whether each group has rights only within its original portion. Neither the United States nor the other parties to that suit contest the continued existence of the whole as an Indian reservation though the decision of the California court of appeal in this case is, of course, noted.

in 1887 [3] and the Indian Reorganization Act of 1934,[4] Congress not only authorized allotments of land within reservations to Indians who lived there but also authorized the Secretary of the Interior to buy surplus lands, *i.e.*, lands not allotted to individual Indians or villages, from the Indians and open them for homesteading by non-Indians. General Allotment Act, Section 5. However, while the General Allotment Act permitted such purchases and disposition of surplus lands, it did not require them. Accordingly, if the Secretary did not acquire unallotted lands within a particular reservation and open them for homesteading, Congress sometimes did so by special legislation.

The statute claimed by respondents to have terminated the Klamath River Reservation was, in our view, a statute opening surplus land in a portion of the Reservation to homesteading, identical in purpose and effect to the Act of March 22, 1906, 34 Stat. 80, which this Court considered in *Seymour* v. *Superintendent, supra.* It had the additional purpose of allowing certain non-Indian settlers to confirm their title to land they had already settled. Senator Pettigrew, in submitting the Conference report to the Senate, explained the factual situation out of which the bill arose (23 Cong. Rec. 4245):

> Through some misunderstanding quite a number of settlers went upon this reservation, it being an Executive-order reservation. By conflicting decisions of the Indian Department they went upon it in good faith, and we wish to protect their interests, so that their lands, where they have built houses and made improvements,

[3] Act of February 8, 1887, 24 Stat. 388.
[4] 48 Stat. 984–988, 25 U.S.C. 461–469.

shall not be allotted to Indians who did not occupy them.

The references to the legislative history in respondent's supplemental reply brief (pp. 1–4) in our view give an erroneous impression. The original House report relied on by respondent and the House bill were not accepted by the Senate. The entire first proviso of the Act, in which Indian rights are preserved and the land is referred to as a reservation, was added after the Senate rejected the House bill. Thus, regardless of whether the House bill was intended to abolish the Reservation, the Act as passed indicates no such intention. Compare the House bill (23 Cong. Rec. 1598) with the Act (Pet. App. D, pp. 3–4). Nor apparently was the lack of solicitude expressed by Senator Felton for Indian inhabitants of the Reservation (see Resp. Supp. Reply Br., pp. 3–4) shared by the Senate committee or Conference committee. Compare the remarks of Senator Pettigrew quoted above. See also the comments of Senator Cockrell at 23 Cong. Rec. 3918–3919.[5]

The Act as finally passed (Act of June 17, 1892, 27 Stat. 52) provided that: "all of the lands embraced in what was Klamath River Reservation" reserved under the Executive Order of November 16, 1855, are "declared to be subject to settlement, entry and purchase under the laws of the United States granting homestead rights * * *, *Provided,* That any Indian now located upon said reservation may, at any time

[5] Additional portions of the legislative history are published in: H. Rep. No. 161, 52d Cong., 1st Sess.; S. Misc. Doc. No. 153, 52d Cong., 1st Sess. (Conference report); 23 Cong. Rec. 1598, 2301, 3918–3919, 3969, 4225, 4417, 4245, 4714, 4893–4894.

within one year from the passage of this act, apply to the Secretary of the Interior for an allotment of land for himself * * *. And the Secretary of the Interior may reserve from settlement, entry, or purchase any tract or tracts of land upon which any village or settlement of Indians is now located, and may set apart the same for the permanent use and occupation of said village or settlement of Indians." The Act further provided that "the proceeds arising from the sale of said lands shall constitute a fund to be used under the direction of the Secretary of the Interior for the maintenance and education of the Indians now residing on said lands and their children" (27 Stat. 53).

In context, the reference to "what was Klamath River Reservation" is only a means of identifying the part of the Klamath-Hoopa Reservation which had previously been the separate Klamath River Reservation and which was the portion on which entry would be allowed. The effect of the Act was to open a part of the Reservation to entry (including entries already made), without displacing Indians living on the Reservation, and to use the funds thus generated for the benefit of resident Indians. There is no indication of a purpose to withdraw federal authority over the Reservation. When reservations were abolished, more direct language was used. Thus in 1868 when Congress abolished the adjoining Smith River Reservation it used the words "The Smith River reservation is hereby discontinued"—15 Stat. 221—and did not rely on implication. See also *Seymour* v. *Superintendent, supra,* 368 U.S. at 355.

Moreover, after allowing entry to surplus lands, Congress itself continued to treat the Klamath River Reservation as an existing reservation. Thus, in the Act of December 24, 1942, 56 Stat. 1081, 25 U.S.C. 348a, "The period of trust on lands allotted to Indians of the Klamath River Reservation * * *" was extended. And in the Act of May 19, 1958, 72 Stat. 121, Congress restored to tribal ownership 159.57 acres of "vacant and undisposed-of ceded lands * * * on the following named Indian reservations: * * * Klamath River, California * * *."

In *United States* v. *Celestine,* 215 U.S. 278, this Court, in keeping with the general principle that "legislation of Congress is to be construed in the interest of the Indian * * *" (*id.* at 290), specifically stated (*id.* at 285):

> [W]hen Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress.

In sum, it is significant here, as it was in *Seymour* v. *Superintendent, supra,* that "* * * Congress has explicitly recognized the continued existence as a federal Indian reservation of this * * * Reservation." 368 U.S. at 356.

3. Our position in this case is also supported by the congressional definition of Indian country in 18 U.S.C. 1151. See *Seymour* v. *Superintendent, supra,* 368 U.S. at 357–359. This statutory definition, enacted in 1948 and amended in 1949, necessarily had to deal with the effect of statutes such as those opening the Colville and Klamath reservations to non-Indian set-

tlement and thus, in some areas, creating a checkerboard of land held in trust for Indians and land held in fee by Indians and non-Indians. Congress, to avoid such a checkerboard of jurisdictions, defined Indian country as including "all land within the limits of any Indian reservation * * * notwithstanding the issuance of any patent * * *." 18 U.S.C. 1151. If opening a reservation to settlement terminated the reservation, the effect would be to make that provision meaningless for there could be no reservation containing patented lands.

For the foregoing reasons, the petition for a writ of certiorari should be granted.[6]

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1973.

[6] If the Court agrees with our submission that the question presented in the petition is essentially controlled by this Court's decision in *Seymour* v. *Superintendent*, *supra*, it may deem the case appropriate for summary reversal with a remand to the California court of appeal for a determination of the question whether the petitioner does in fact have federally secured rights which would exempt him from the application of the California fishing laws in question while in Indian country.

U.S. GOVERNMENT PRINTING OFFICE: 1973